BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL RAMIREZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,015,866
HORIZON MILLING LLC	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the Award of Administrative Law Judge John D. Clark of January 18, 2006. Claimant was awarded benefits for a 10 percent permanent partial general disability based on a functional impairment, followed by a 67 percent permanent partial disability, for injuries suffered on February 4, 2004. The Appeals Board (Board) heard oral argument on April 26, 2006.

APPEARANCES

Claimant appeared by his attorney, Tamara J. Collins of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). Additionally, at oral argument, the parties agreed claimant's average weekly wage on the date of accident was $442.18.[1] The parties also stipulated that the only task loss opinion in the record is that of Pedro A. Murati, M.D. The parties agreed that if work disability was found to be appropriate in this matter, the 31.5 percent task loss opinion of Dr. Murati would be accurate. Accordingly,

[1] The ALJ, in computing the award, utilized a compensation rate of $281.47. With an average weekly wage of $442.18, the correct compensation rate would be $294.80. This discrepancy will be corrected in the Board's Award paragraph.

the mistaken utilization of a 33.5 percent task loss by the ALJ will be corrected in the final award, if appropriate.

ISSUES

What is the nature and extent of claimant's impairment? More particularly, what, if any, percent of functional impairment did claimant suffer? Additionally, what, if any, loss of wage earnings, pursuant to K.S.A. 44-510e, did claimant suffer?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be modified to utilize the correct task loss percentage and compensation rate, but in all other regards should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. Except as specifically noted herein, the Board adopts those findings and conclusions as its own.

Claimant had worked for respondent as a packer since 2001. On February 4, 2004, while carrying two buckets of wheat, claimant slipped on ice and fell down several steps, landing on his tailbone and neck. Claimant also caught the little finger on his left hand, suffering a sprain. Claimant claims injury to his low back, middle back, neck, shoulders and the left little finger.

Claimant reported the injury to his supervisors, but was not provided medical treatment. Claimant went to the Jordan Chiropractic Clinic and obtained unauthorized treatment. Respondent sent claimant to Dr. Steven Hughes, the company doctor, on February 17, 2004. Dr. Hughes ordered physical therapy and provided pain medication. On March 23, 2004, claimant was referred to Robert Eyster, M.D. Dr. Eyster ordered an MRI of the neck and low back, which revealed a central disc bulge at L4-5 with mild posterolateral bulge at L5-S1. There was mild encroachment into the left neural foramina at C3-4, C4-5 and C5-6, with minimal bilateral encroachment at C6-7. Claimant was returned to restricted duty on April 27, 2004, by Dr. Eyster. Respondent accommodated claimant's light duty restrictions until respondent's plant shut down on June 24, 2005.

Claimant was referred to Dr. Rodney Jones for epidural injections with little benefit. Claimant was then referred to Paul S. Stein, M.D., a neurosurgeon, on September 30, 2004. Dr. Stein diagnosed a soft tissue injury in the neck, but did not recommend surgery.

Claimant was referred by his attorney to Dr. Murati for an examination on November 16, 2004. Dr. Murati diagnosed claimant with degenerative disc disease, radiculopathy, myofascial pain syndrome in the shoulders, extending into the cervical and

thoracic paraspinals, early carpal tunnel syndrome, and left SI joint dysfunction. Dr. Murati rated claimant with a 33 percent permanent partial whole body impairment pursuant to the fourth edition of the AMA *Guides.*[2] Dr. Murati restricted claimant from climbing ladders, crawling, working above shoulder level, or repetitively grasping, lifting, carrying, pushing or pulling over 35 pounds. Claimant was to bend, crouch and stoop only rarely, was allowed to climb stairs, squat and grasp occasionally and could frequently sit, stand, walk, drive and use hand controls. Claimant's lifting was limited to 35 pounds maximum lift occasionally and 20 pounds frequently.

Claimant was referred by the ALJ to board certified physical medicine specialist Philip R. Mills, M.D., for an independent medical examination on March 28, 2005. Dr. Mills diagnosed claimant with cervical and LS sprain with underlying degenerative arthritic changes and myofascial type pain. Dr. Mills found nothing to support a diagnosis of carpal tunnel syndrome. Dr. Mills assessed claimant a 10 percent permanent partial impairment to the whole body. Dr. Mills placed restrictions on claimant identical to those provided by Dr. Eyster. Claimant was restricted to single lifts up to 25 pounds and repetitive lifts up to 10 pounds. Claimant was restricted from excessive overhead work and cautioned against excessive pushing or pulling. As noted above, claimant worked under these restrictions until the plant closed.

K.S.A. 2003 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[3]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[4]

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[3] K.S.A. 2003 Supp. 44-508(d).

[4] K.S.A. 44-510e(a).

The ALJ found Dr. Mills' functional impairment rating to be the most credible. The Board agrees and awards claimant a 10 percent permanent partial disability on a functional basis for the injuries suffered on February 4, 2004.

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

Claimant testified to the extent of his job search after the plant closing. From the last day worked to the date of the regular hearing was 87 days. In that period, claimant applied at 33 places of employment.[8] The Board acknowledges the list provided by claimant is limited to employer names and telephone numbers only. The Board has rejected such spartan lists in the past, as they provide little, if any, information regarding the type or extent of the contact. However, here claimant testified regarding several of the contacts and his ongoing efforts. The Board finds, in this situation, the list provided by claimant, coupled with his testimony, is sufficient to support a finding that claimant put forth a good faith effort to obtain employment after the plant closed.

Respondent argues claimant lost a potential job due to his lack of a good faith effort, citing the testimony of vocational expert Jon Rosell, Ph.D. Dr. Rosell provided claimant with several leads on possible jobs. One of those leads was with the Wellington Daily News. Respondent argues claimant delayed contacting the Daily News until after the job was filled. However, Dr. Rosell testified he notified claimant of the job opening at their meeting on September 1, 2005. Claimant testified he contacted the Daily News on a

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Id.* at 320.

[8] R.H. Trans., Cl. Ex. 6.

Friday before the regular hearing on September 19, 2005. This would indicate claimant contacted the Daily News on either September 9 or September 16, creating a delay of either 8 or 15 days from the September 1 meeting. The Board notes that Dr. Rosell advised respondent's attorney of the possible job openings, including the Daily News job, by letter of August 15, 2005. This computes to a delay of approximately 15 days from the time Dr. Rosell advised respondent's attorney to when he advised claimant.

The Board questions why the respondent's delay of two weeks is acceptable when claimant's delay for the same or less time is not. The Board finds claimant's job search satisfies the good faith requirements of K.S.A. 44-510e. As claimant is not currently employed, the Board finds claimant has suffered a 100 percent wage loss.

In averaging the wage loss with claimant's task loss, the Board finds claimant has suffered a 65.75 percent permanent partial disability for the injuries suffered on February 4, 2004.

The Appeals Board finds that the Award of Administrative Law Judge John D. Clark dated January 18, 2006, should be modified to correct the task loss percentage and incorporate the appropriate compensation rate, but is affirmed in all other regards.

AWARD

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Paul Ramirez, and against the respondent, Horizon Milling LLC, and its insurance carrier, Insurance Company of the State of Pennsylvania, for an accidental injury which occurred on February 4, 2004, and based upon an average weekly wage of $442.18, for 41.5 weeks of permanent partial disability compensation at the rate of $294.80 per week or $12,234.20, for a 10 percent permanent partial disability on a functional basis. Effective June 25, 2005, claimant is entitled to an additional 231.36 weeks compensation at the rate of $294.80 totaling $68,204.93 for a 65.75 percent permanent partial general disability, making a total award of $80,439.13.

As of May 2, 2006, there is due and owing claimant 86.07 weeks of permanent partial disability compensation at the rate of $294.80 per week in the sum of $25,373.44, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $55,065.69 shall be paid at the rate of $294.80 per week until fully paid or until further order of the Director.

No award of attorney fees was included in the Award by the ALJ. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with and

approved by the Director. Any award of attorney fees in this matter shall be subject to the written contract being filed with and approved by the Director.

IT IS SO ORDERED.

Dated this ____ day of May, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director